Supreme Court, U.S.
FILED
JAN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROY L. RYAN
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

WILLIAM J. HARDY
HIRAM C. EASTLAND, JR.
(Counsel of Record)
Eastland & Hardy
6360 I-55 North
IBM Building Suite 336
Jackson, Mississippi 39211

Madison Building
1155 15th Street, Suite 510
Washington, D.C. 20005
(601) 956-0154
(202) 785-0369

Shelton & Jones
1801 Avenue Q
Lubbock, Texas 79401
(806) 763-5201

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgement of the U.S. Court of Appeals for the Fifth Circuit in the above mentioned case, entered October 12, 1988.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the panel decision conflicts in principle with Yates v. United States, which reversed a jury

determination where the jury was allowed to consider inappropriate overt acts in reaching the conspiracy verdict?

2. Whether the Panel Decision conflicts with Yates v. United States, 354 U.S. 298 (1957), Mills v. Maryland and Stromberg v. California through its holding allowing the jury to consider non overt acts as overt acts in determining whether there was evidence of a conspiracy, when the Supreme Court has consistently held that conspiracy verdicts must be set aside if the reviewing court cannot be certain which of two grounds was relied upon by the jury in reaching the conspiracy verdict?

3. Whether Pinkerton charge induced convictions for substantive offenses can support a conspiracy conviction, when the Pinkerton charge induced convictions could be based on the above invalid jury determination of conspiracy?

4. Whether the Panel Decision allowing a jury determination of conspiracy based on consideration of non overt acts, conflicts with the Yates v. Aiken, Francis v. Franklin, Sandstrom, In re Winship, line of Supreme Court cases holding it a violation of due process requiring reversal to allow a conviction where the government was not required to "prove `every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt"?

5. Whether the Panel Decision allowing a jury determination of guilt through vicarious liability for substantive offenses, based on a Pinkerton charge which relies on the above invalid determination of a conspiracy, conflicts with the Yates v. Aiken, Francis v. Franklin, Sandstom, In re Winship line of Supreme Court cases

holding it a violation of due process requiring reversal to allow a conviction where the government is not required to "prove `every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt."?

6. Whether the Panel Decision upholding a wire fraud jury instruction which permitted the jury to conclude that intent to bring about "financial gain" was sufficient to constitute intent to defraud for purposes of violating the wire fraud statute conflicts with the United States v. McNally holding of this Court that "financial gain" is not sufficient to support a violation, but rather an intent to cause deprivation of "property" is required?

7. Whether the Panel Decision allowing a jury determination of wire fraud under jury instructions which

permitted the jury to conclude that intent to bring about "financial gain" was sufficient to constitute intent to to defraud for purposes of determining wire fraud violations, conflicts with the Yates v. Aiken, Francis v. Franklin, Sandstrom, In re Winship line of Supreme Court cases holding it a violation of due process requiring reversal to allow a conviction where the government is not required to "prove `every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt"?

8. Whether a conviction of wire fraud based on a bank's unilaterally wiring money to the defendant to honor an insufficient funds check that was previously hand delivered to the defendant by a title company at a land closing conflicts with this Court's decision in Kann v. United States which held that "[i]t cannot be said that the

[wirings] in question were for the purpose of executing the scheme, as the statute requires"?

9. Whether the Panel Decision allowing the general conspiracy verdict to stand when the jury instructions on certain substantive offenses are invalid, conflicts with Sandstrom v. California?

LIST OF PARTIES

The parties to the proceeding below were Petitioner Roy L. Ryan, Tyrell Barker, a/k/a Terry Barker, Laurence B. Vineyard, Jr., and the United States of America.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, NO. 87-1683, was rendered on October 12, 1988. The unreported opinion affirming the conviction of Petitioner is reprinted in the appendix hereto at A.

JURISDICTION

Federal jurisdiction was invoked under 28 U.S.C. 1291, in that Petitioner appealed from a final decision of the United States District Court for the Northern District of Texas.

On Petitioner's appeal, the Court of Appeals for the Fifth Circuit entered its opinion on October 12, 1988, affirming the District Court conviction after trial by jury. Petitioner's Motion for Panel Rehearing was denied on November 9, 1988. See Appendix B. Petitioner's Motion for Stay of Issuance of Mandate Pending Application to this Honorable Court for a

Writ of Certiorari was denied on November 30,1988.

The jurisdiction of the court to review the judgement of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. 1254(1) (1948).

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The pertinent provisions of the United States Constitution and the pertinent statutory provisions are as follows:

> Amendment V, United States Constitution.
> No person shall...be deprived of life, liberty, or property, without due process of law....
>
> Wire Fraud, 18 U.S.C. 1343 (1956).
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice,

> shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This appeal arrises from Petitioner Roy L. Ryan's convictions for one count of conspiracy under a general conspiracy verdict; two counts of wire fraud; and three counts of false statements to a federally insured institution.

On June 26, 1986, Petitioner Ryan and ten others were charged by an indictment that was dismissed on December 19, 1986 when it was superseded by a new indictment filed on December 10, 1986. Petitioner Ryan, along with six co-defendants, was charged in the eighteen count superseding indictment with conspiracy to violate six separate felonies, submitting false statements to a federally insured savings and loan association, wire and mail fraud and aiding and abetting the commission of the listed offenses.

On January 13, 1987 Petitioner Ryan and codefendants Barker and Vineyard were tried to a jury before the Honorable Halbert O. Woodward. Spikes, Brooks and McCallister earlier had entered pleas of guilty and charges against Hurst had been dismissed on December 30, 1986.

Importantly, Petitioner initially was indicted for a conspiracy alleged to have begun on August 1, 1983.

The above referenced superceding indictment alleged that the conspiracy began on June 1, 1983.

On the morning of trial, after the jury had been empaneled, while at a bench conference held immediately prior to opening statement, the government told the trial court that the conspiracy began on August 25, 1983 and that the eleven overt acts that preceded that date should be redacted from the indictment. The Court submitted the unredacted indictment to the jury to utilize in its

deliberations and instructed the jury, inter alia, that it must find, beyond a reasonable doubt, that one of the conspirators committed one of the listed overt acts during the existence of the conspiracy, and that act further the conspiracy.

The Court instructed that:

> What the evidence in the case must show beyond a reasonable doubt is:
>
> One: That two or more persons, in some way or manner, positively or tacitly came to a manual understanding to try to accomplish a common and unlawful plan as charged in the indictment.
>
> Two: That the defendants willfully became a member of such conspiracy.
>
> Three: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods or overt acts described in the indictment.
>
> And Fourth: That such overt act was knowingly committed at or about the time alleged in an effort to affect or accomplish some object or purpose of the conspiracy. (Court's Charge, page 17).

The jury was also given the Pinkerton charge, which allowed the jury, once the conspiracy was proven, to find Ryan guilty for the successive, substantive counts under an agency theory of vicarious liability.

The Court instructed

> Now, if you find that a defendant is guilty of conspiracy as charged in Count 1, you may also find the defendant guilty of a substantive offense as charged in any other count of the indictment provided that you find that the essential elements of that count [the conspiracy] as defined in these instructions, have been established beyond a reasonable doubt and provided that you also find beyond a reasonable doubt:
>
> First, that the offense defined in the substantive count was committed pursuant to the conspiracy and, second, that the conspiracy--that the particular defendant was a member of the conspiracy at the time substantive offense was committed.
>
> Now, under these conditions just defined, a defendant may be found guilty of a substantive count even though he did not participate in the acts constituting the offense as defined in the substantive count. The reason for this is that a co-

> conspirator committing a substantive offense, pursuant to a conspiracy, is held to be an agent of the other conspirators. (Count's Charge, pp.24-25).

Petitioner Ryan was convicted of one count of conspiracy, three counts of aiding and abetting the submission of false financial statements to a federally insured agency, and two counts of wire fraud. Petitioner Ryan was acquitted of all four mail fraud counts and the remaining six wire fraud counts.

On August 27, 1987, the court sentenced Appellant Ryan to five years on the conspiracy count; two years on each false statement count to be served consecutively to the conspiracy count, but concurrently with each other, and three years on the two wire fraud counts, to be served concurrently with each other and the misapplication counts, but consecutively to the conspiracy charge. Ryan was ordered to serve a total of eight

years in prison, fined $22,000 and ordered to pay restitution.

Petitioner Ryan filed a timely Notice of Appeal to the Court of Appeals for the Fifth Circuit. Jurisdiction was invoked under 28 U.S.C. 1291, since Petitioner appealed from a final decision of the United States District Court for the Northern District of Texas.

Upon appeal to the Fifth Circuit Petitioner Ryan challenged the District Court convictions on numerous grounds, requiring reversal; including (1) prejudicial variance between proof and indictment; (2) that the conspiracy count was duplicitous; (3) that the conspiracy charge asserted two offenses misjoined in one count; (4) that there was insufficient evidence that Petitioner joined in the conspiracy charged, or that he aided and abetted the creation of false financial statements; (5) that the government

was not required to meet every element of proof to sustain a conviction against Petitioner in violation of constitutional due process, since by the government's own admission the jury was given various alleged "overt acts" to consider in determining whether there was a conspiracy, which the government conceded should have been redacted as they were not overt acts; (6) that the above error in requiring proof in every element of proof to sustain a conspiracy conviction required not only reversal of the conspiracy conviction but the substantive offenses as well, since a Pinkerton charge was given allowing vicarious liability for the substantive offenses upon the jury's determination of proof of a conspiracy; (7) that under Fed. R. Evid. 404(b) the district Court erred in not clearly instructing the jury that evidence regarding the extraneous acts which the government

conceded should have been redacted was being received only to show "motive" and "intent"; (8) that the trial court gave erroneous jury instructions on the wire fraud count, and there was failure of factual proof on the creation and submission of false statements to a federally insured institution, (9) any one of the above errors in the jury instructions or failure of factual proof for the substantive offense requires reversal of the conspiracy convictions since when one conspiracy alleges multiple objections and there is a general conspiracy verdict, a deficiency, legal or factual, pertaining to one of the conspiracy's multiple objects, requires reversal under Stromberg v. California, 283 U.S. 359 (1931), and (10) that Petitioner's five year sentence for conspiracy is illegal because, under the Stromberg rationale, the jury could have rested its guilty

verdict on its finding that Petitioner conspired to violate Section 1014, a two year offense.

In summarizing the Court of Appeals decision as it relates to affirming the convictions against Petitioner Ryan, the decision found there was no fatal variance between the indictment and the proof at trial, on the grounds that Petitioner's concern about charging government conceded pre-conspiracy non overt acts as overt acts is not prejudicial because (1) it did not effectively alter the charging terms of the indictment; (2) that the variance "does not change the government's theory of the case" and that "defendant's substantial rights are not affected"; (3) that Petitioner is effectively "complain[ing] that the indictment charged more than was necessary,"; (4) that "the appropriate remedy is to ignore that part of the indictment that is

unnecessary in proving the offenses."; (5) that "the government need not prove the exact point in time at which the conspiracy began"; (6) that "no matter when this conspiracy actually began, the evidence shows that the government proved the same conspiracy that was alleged in the indictment and that Ryan voluntarily participated in that conspiracy"; (7) that "Ryan was not prejudiced" "by the court's failure to redact certain overt acts from the indictment before it was submitted to the jury" though "the government concedes that those acts should have been stricken"; (8) even if those acts weren't overt acts "they were relevant to show the background of the charged conspiracy and therefore admissible"; (9) "the record shows that the jury did not rely on these overt acts". "Ryan was convicted on five substantive offenses, each of which was listed as an

alleged overt act and each of which occurred after the commencement of the conspiracy." "Since acts occurring outside the scope of the proved conspiracy did not form the basis for Ryan's conspiracy conviction, he was not prejudiced by their inclusion in the indictment.",

(10) For the reasons above, and also for the reason that none of the defendants requested an instruction under Fed. R. Evid. 404(b) regarding receipt of the evidence regarding the above non-redacted acts merely to show "motive" and "intent", the Court of Appeals also found that Petitioner could not rely on Fed. R. Evid. 404(b) to argue "that he was prejudiced by the instruction of evidence regarding the extraneous overt acts."

Importantly Petitioner Ryan would note that the Court of Appeals decision nowhere adresses his critical argument, based on Yates v. United States, 354 U.S.

298, 311-312 (1957), that this Honorable Court has previously held that it is reversible error for a jury to rest a determination of proof of guilt of conspiracy on inappropriate overt acts. This Court in Yates, supra, held that because the Court was unable to determine that the jury rested its conspiracy verdict on proof of overt acts within the statutory time limit, the conspiracy conviction had to be reversed.1/

The Court of Appeals also

1/ As discussed infra, there is no way the Court could determine that the general conspiracy verdict was based on overt acts rather than the acts which the government conceded as acts that should have been redacted. Moreover, the substantive offense convictions, which refer to overt acts occurring after the acts which the government conceded should have redacted, cannot with certainty demonstrate that the jury relied on appropriate overt acts, since a Pinkerton charge was given allowing vicarious conviction of Petitioner Ryan for the substantive offenses even if he committed none of the acts supporting the substantive offenses, upon finding a conspiracy.

specifically stated that it did not address Petitioner Ryan's contention that upon finding error regarding the conspiracy conviction that the substantive offense convictions must be reversed as well, since a Pinkerton charge was given the jury.2/ The Court of Appeals found that "[b]ecause we have affirmed the conspiracy convictions in this case, we need not address this issue."

As related to the above Yates argument, the Court of Appeals also did not address Petitioner's correlative argument, that to allow a conspiracy conviction to rest on acts that do not constitute overt acts

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2/ As this Court is aware, United States v. Pinkerton, 328 U.S. 640 (1946) holds that a defendant may be convicted for substantive offenses committed by his co-conspirators even if he did not participate in them, upon a valid finding that he was part of the general conspiracy. Here, of course, the conspiracy determination is based on reversible error.

violated due process, since the Court, in effect, allowed the government to make its case without proving every essential element of the criminal conspiracy charge.

Petitioner Ryan would likewise note that in ruling upon Petitioner's challenge to the jury instructions and the inadequate factual proof to support the substantive offenses referenced supra, the Court of Appeals did not address the point that a ruling in Petitioner's favor on any one of those issues relating to the substantive offenses would also require reversal of the conspiracy conviction, under Stromberg v California, 283 U.S. 359 (1931) 3/

3/ As the Court is aware, Stromberg v. California, held that when one conspiracy alleges multiple objections and there is a general conspiracy verdict of guilty, a deficiency, legal or factual, pertaining to one of the conspiracy's multiple objects, will require reversal.

In ruling on Petitioner Ryan's challenge to the **sufficiency of evidence** to support the **conspiracy convictions** the Court of Appeals found that (1) "the record demonstrates that there was sufficient evidence to show both the existence of the conspiracy and the knowing participation of each appellant in it."; (2) that "Ryan relayed instructions from Barker and Vineyard 4/ to Spikes to set up two shell corporations to handle the `land flip'" 5/ Ryan then purchased the land to be used in the `flip', had the land appraised at a drastically inflated value", 6/ and "assisted in the preparation of various

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4/ A lawyer.

5/ Petitioner Ryan was a real estate agent who bought and sold land.

6/ There is conflicting evidence in the Record on this assertion even by the government's own witnesses.

"assisted in the preparation of various fictitious financial statements", 7/ and (3) that "[t]he evidence amply demonstrates that appellants knew of the conspiracy's essential purpose; therefore, they need not have been aware of or participated in each and every aspect of the conspiracy."

In ruling upon Petitioner Ryan's contention that there was insufficient evidence to prove he conspired to make false statements to Brownfield Savings and Loan, 8/ the Court of Appeals found "the verdict stands if the evidence is sufficient with respect to any one of the acts charged. [citations omitted] On this

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7/ This is likewise disputed by the Petitioner, infra.

8/ Petitioner had pointed out there were not even any evidentiary allegations by the government referencing alleged acts in which he allegedly conspired against Brownfield Savings and Loan.

basis this court has previously held that when a conspiracy to commit multiple substantive offenses is alleged, a general verdict may properly be sustained if there is sufficient evidence to support on any one of the multiple objectives."9/

In ruling on Petitioner Ryan's contention that the evidence was insufficient to support the creation of false financial statements for Brooks and McCallister for a loan with Key Savings, because the government failed to prove Petitioner was aware that the statements were overvalued, the Court of Appeals concluded "the evidence regarding [the financial statements] fully supports Ryan's conviction."

9/ Petitioner would note his challenges, for example, that the conspiracy conviction itself was erroneous because it cannot be determined that it was not based on the government conceded non-overt acts that should have been redacted.

The Court of Appeals likewise ruled against Petitioner on the duplicitous joinder of two offenses in one alleged conspiracy issue, on the basis that "[b]y failure to challenge this alleged duplicity before trial, Ryan failed to preserve the issue for appeal.... His attempt to avoid this problem...is foreclosed....To constitute reversible error, a misjoinder must result is actual prejudice to an accused's substantial rights...Ryan has shown no such actual prejudice."

The Court of Appeals ruled against Petitioner Ryan's challenge that the wire fraud jury instruction was erroneous under McNally v. United States, __U.S.__ 107 S.Ct. 2875 (1987) because the instruction permitted a guilty verdict without showing the property deprivation required by McNally, on the Court of Appeals' rationale that the court's instructions "made clear that the jury could convict

only upon finding that the scheme to defraud involved a deprivation of property."10/

Finally, the Court of Appeals rejected Petitioner Ryan's assertion that the five year sentence for conspiracy under the general conspiracy verdict violates due process since one of the object offenses provides for a maximum sentence of two years. The Court of Appeals reasoned that "[o]nly in situations in which the underlying offense is a misdemeanor is `the punishment for conspiracy ... the maximum punishment for such misdemeanor.'" Under 18 U.S.C. Section 371,"... a conspiracy is a separate crime which merits separate punishment; that punishment can be even

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10/ As discussed infra, Petitioner Ryan respectfully submits that the instructions themselves clearly demonstrate otherwise.

more severe than the punishment for the completed substantive offense."11/

REASONS FOR GRANTING THE WRIT

The issues raised in Petitioner Ryan's application to the Supreme Court cut to the very core of fundamental fairness and due process in the criminal justice system. In considering the type of issues herein dictating respect for human freedom, and requiring the government to prove every element of its charges before depriving a defendant of liberty, the Supreme Court has repeatedly reaffirmed that strictly requiring the government to meet its elements of proof by requiring the appropriate elements of proof to be before the jury for its

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11/ Petitioner Ryan respectfully submits that even assuming the validity of the above sentencing ruling, the ruling highlights the egregiousness of the effect of the Panel Decision since the referenced conspiracy conviction is not based on proof of all the essential elements of conspiracy beyond a reasonable doubt.

determination of guilt, "protects the fundamental value determination of our society . . . that `it is far worse to convict an innocent man than to let a guilty man go free'". Yates v. Aiken, infra, quoting Justice Harlan in Winship, infra.

In all due respect, the Circuit Court in the instant case carefully refused to address the critical controlling arguments raised by Petitioner in his briefs and at oral argument. The lower Court opinion is loaded with specious, boiler-plate responses which do not control when fundamental, "bedrock" Supreme Court precedent of the nature raised herein is applicable.

From a practical as well as a substantive standpoint the substantial issues presented to the Supreme Court in this case represent a textbook example of the constitutional and judicial policy

conflicts in logic, rationale, and law a District or Circuit Court will quickly find themselves in if they attempt to justify and sustain a failure to provide a defendant one of the most fundamentally valued assurances of the criminal justice system: the assurance that the government be required to prove beyond a reasonable doubt every essential element of proof of the charges against the defendant.

As discussed and demonstrated in detail below, the effect of this decision is to sustain a conviction on conspiracy and wire fraud, when the conviction was allowed on less standards of proof than required to sustain conspiracy or wire fraud convictions. Indeed, since a Pinkerton conspiracy charge was given allowing vicarious conviction on other substantive counts once a conspiracy was found under the lesser standards of proof

herein, the error spread to the substantive offense convictions, requiring reversal on all counts.

To the contrary, assurances are provided American citizens that before taking the most basic of all human rights, liberty, the government is strictly required to abide by and strictly prove correct elements of proof necessary to support a particular charge.

These basic American protections and respect for human freedom are fundamental to our criminal justice system, are emblazoned in our federal constitution requiring due process, are embodied in the elements of required proof to sustain a criminal charge, are further implemented through our Federal Rules of Criminal Procedure, and are justly championed by the decisions of the United States Supreme Court.

Granting this Petition for a Writ of Certiorari is clearly warranted since the Panel Decision conflicts with several lines of Supreme Court decisions requiring reversal of criminal convictions when the district court has failed to require the government to prove the essential elements necessary to support a criminal charge.

1. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH SUPREME COURT DECISIONS RULING ON APPROPRIATE JURY CONSIDERATION OF THE ESSENTIAL ELEMENT OF OVERT ACTS NECESSARY TO SUSTAIN A CONSPIRACY CONVICTION, AND DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS REQUIRING REVERSAL WHERE THE REVIEWING COURT CANNOT BE CERTAIN WHICH OF TWO GROUNDS WAS RELIED UPON BY THE JURY IN REACHING THE CONSPIRACY VERDICT.

It is, without a doubt, undisputed by the government and the Panel Decision that Petitioner Ryan's jury was told that in its consideration of whether the government met its elements of proof of the conspiracy charge it could use acts which the trial court, the prosecutor and the

Circuit Court now acknowledge are not overt acts (because they occurred prior to August 25, 1983), as a basis for determining whether the government met its proof of the conspiracy charge.

Here, eleven events between June 1 and August 25, were characterized by the Court and prosecutor to the jury as overt acts upon which the jury could rest a conspiracy conviction. This representation by the Court (Court Charge, p. 17) and by the prosecutor (Closing Argument, p. 210) was absolutely not true because the court had found and the government agreed that the conspiracy began not on June 1, but on August 25, and the eleven "overt acts" between those dates were not overt acts upon which the jury could rest a conspiracy conviction.12/

12/ While it is true that the government need not prove the exact point the conspiracy began, here the government specifically stated it began on August 25. It

A conflict in principle of tremendous impact regarding the elements essential to proving a conspiracy is thus presented to the Supreme Court in this case. The Supreme Court has previously held that it is reversible error for a jury to rest a determination of proof of guilt of conspiracy on inappropriate overt acts. Because the Supreme Court was unable to determine that the jury rested its conspiracy verdict on proof of overt acts within the statutory time limit, the Supreme Court in Yates v. United States, 354 U.S. 298, 311-312, (1957), reversed the conviction. Accord, Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988); Stromberg v. California, 283 U.S. 359, 367-368 (1931); United States v. Pepe, 747 F.2d 632, 664, (11th Cir. 1984).

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claimed it knew the date and specifically stated that the eleven overt acts prior to August 25 were not overt acts.

Moreover, as supported by this Court as recent as June of 1988, the Panel Decision directly conflicts with Supreme Court decisions requiring reversal where the reviewing court cannot be certain which of two grounds was relied upon by the jury in reaching the conspiracy verdict:

> "With respect to findings on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See eg., Yates v. United States 354 U.S. 298, 312 (1957), Stromberg v. California 283 U.S. 359, 367-368(1931)."

The parallel application of the principle of Yates, for example, to this case is exact, because the court can not determine that the government was required to prove its conspiracy charge with appropriate overt acts.

Indeed, from a fundamental fairness

standpoint the circumstances and the substantial issues raised for reversal herein are even more compelling in this case, because the jury in Yates was presented with overt acts outside statutory time limits, while the acts allowed to be considered as proof of conspiracy herein are now undisputed to be non overt acts!

Yates v. United States, 354 U.S. at 311-312, reversed a conspiracy conviction for organizing and advocating the overthrow of the United States because the overt acts that supported the organizing prong of the charge were time-barred by the statute of limitations. Because the Supreme Court was unable to determine that the jury rested its verdict on overt acts within the statutory limit, it reversed the conviction. The Yates case is the law today and is virtually identical to the case at hand because the jury

in this case could have rested its conspiracy conviction on a non overt act prior to August 25, 1983, and then relied upon the Pinkerton charge to find Ryan guilty of the substantive counts that occurred within the conspiracy's life. United States v. Pepe, 747 F. 2d at 664 (11th Cir. 1984), also specifically held that it was error to submit time barred overt acts to a jury to consider as evidence in formulating a conspiracy. The court stated ". . . the district court's failure to strike the [time barred] overt act was error." Id. at 664.

The panel opinion states that because Petitioner was convicted of substantive counts that occurred after August 25, then ". . . acts occurring outside the scope of the proved conspiracy did not form the basis for Petitioner's conspiracy conviction [and] he was not prejudiced by their inclusion

in the indictment." (Opinion, p. 26). The Court cites United States v. Saenz, 747 F.2d 930, 937, (5th Cir. 1984), cert denied, 473 U.S. 906 (1985) as support.

With all due respect, Petitioner contends that the panel opinion ignores the effect of the Pinkerton instruction which allowed the jury to convict on the substantive charges without regard for Petitioner's involvement in those charges if the jury found proof of a conspiracy. In Saenz, there was no Pinkerton charge and the substantive count had sufficient independent evidence. It is thus irrelevant in this case whether there was sufficient independent evidence of the substantive counts because the appellate court is forbidden to substitute its judgement for that of the jury.

An appellate court cannot know whether the jury followed the Pinkerton instruction and found Ryan guilty of the

substantive counts because it found he was a member of a non existent conspiracy that operated from June 1 to August 25. The government must prove beyond a reasonable doubt each element of the offense of conspiracy.

Petitioner is entitled to have the government prove the evidence against him beyond a reasonable doubt on each and every count. This is required by the Due Process Clause of the Constitution. Eg., In re Winship, 397 U.S. 358, 362 (1970); Hamling v. United States, 418 U.S. 87, 1117 (1974); Brinegar v. United States, 338 U.S. 160, 174 (1949).

An exception is made for crimes committed in furtherance of a conspiracy because conspirators are considered each others' agents. This exception only pertains if the conspiracy conviction is validly obtained. However, if the conspiracy conviction is flawed and a

Pinkerton charge is given, then the appellate court cannot substitute its judgement that there the jury independently considered evidence for conviction on the substantive counts. This is because the appellate court (a) cannot know that the jury disregarded the Pinkerton instruction and (b) because of this uncertainty, an accused, such as Ryan, might have been convicted without the jury finding that the government had proven each element of each count beyond a reasonable doubt because the jury might have applied the agency theory of vicarious liability expressed in Pinkerton.

Petitioner's jury was told it could (a) use acts which the trial court, the prosecutor and the Circuit Court acknowledged are not overt acts as a basis for a conspiracy conviction and then, once guilt for the conspiracy was determined, the jury was told (b) it could find

Petitioner guilty of any substantive, successive counts without considering the evidence against him on those counts.13/

The Circuit Court Panel concluded that because the jury found Petitioner guilty of substantive counts that occurred after August 25, the jury could not have relied on the pre-August 25 non overt act to find him guilty of conspiracy. This specious, tautological, i.e. circular, reasoning, counsel respectfully submits, is wrong. The panel opinion does not address the problem raised by Yates and the illogic of using Pinkerton induced convictions on post August 25th substantive counts to hold that the jury

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13/ As this Court recently reaffirmed, the standard and question upon appellate review "`is not what the [Fifth Circuit] declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning' citing Sandstrom v. Montana,442 U.S. 510, 516-517 (1979)"; Mills v.Maryland, __U.S.__, 108 S.Ct. 1860, 1866 (1988).

properly convicted Ryan initially for conspiracy using overt acts (i.e., substantive counts) that occurred after August 25.

The panel also misstates Ryan's position by adopting the government's characterization that Ryan ". . . complains that the indictment charged more than was necessary," citing United States v. Miller, 471 U.S. 130 (1985). In Miller, the Court rejected the claim that Miller was denied due process because the grand jury would not have returned an indictment if it knew the narrower proof that would be offered at trial. The Supreme Court did not hold in Miller that the government does not have the burden of proving each element beyond a reasonable doubt. Miller is no support to show Ryan was not prejudiced when the jury was told that eleven events were overt acts and evidence allowed to prove

conspiracy and the jury was told that they could rest a conspiracy conviction upon proof beyond a reasonable doubt of any one of them.

The Circuit Court's misreading of Miller thus also in effect overrules and conflicts with Yates v. United States, because the panel's interpretation of Miller allows for convictions on invalid premises.

In all due respect, the Court of Appeals thus ducked the controlling issue now before this Court which is whether there has been a violation of Petitioner's due process rights.

Petitioner Ryan therefore respectfully requests this Honorable Court to address directly the issue of whether a conspiracy conviction can rest upon non overt acts and whether convictions for post-conspiracy counts (alleged as overt acts) can support a conspiracy conviction

when those count convictions were induced by a Pinkerton charge.

The Panel Decision plainly conflicts with prior Supreme Court case law. Under the circumstances of this case the elements of proof considered by the jury were less than those required to sustain a conspiracy conviction, and based on an inadequate proof of an essential element of conspiracy the Pinkerton charge acted in this case to allow a less than adequate consideration of proof of the substantive charges in violation of Petitioner's due process rights.

2. THE DECISION BELOW CONFLICTS WITH SUPREME COURT DECISIONS PROTECTING FUNDAMENTAL DUE PROCESS RIGHTS BY REQUIRING REVERSAL WHERE THE LOWER COURTS FAIL TO ASSURE THAT THE GOVERNMENT MUST PROVE EVERY ESSENTIAL ELEMENT OF CRIMINAL CHARGES BEYOND A REASONABLE DOUBT.

As previously discussed, the effect of the decision herein is to sustain a conviction of conspiracy, when the

conviction was allowed on less standards of proof that required to sustain a criminal conspiracy conviction.

Indeed, since a Pinkerton conspiracy charge was given allowing vicarious conviction on other substantive counts once a conspiracy was found under the lesser standards of proof herein, Petitioner likewise submits that the conviction on all substantive offense counts herein must likewise be reversed. The substantive count convictions themselves must be reversed, since the jury could have erroneously assigned vicarious liability to Appellant Ryan for the substantive count convictions under the Pinkerton charge, when it erroneously found proof of a conspiracy based on non overt acts.

To the contrary, this Honorable Court has repeatedly reaffirmed that assurances must be provided American citizens that before taking the most

basic of all human rights, liberty, the government is strictly required to abide by and strictly prove every essential correct element of proof necessary to support a particular charge.

As previously stated, these basic American protections and respect for human freedom are fundamental to our criminal justice system, are emblazoned in our federal constitution requiring due process, are embodied in the elements of required proof to sustain a criminal charge, and are justly championed by the decisions of this Court.

Indeed, this Court has recently re-affirmed its determination to strictly require the government to meet its proper elements of required proof through such decisions as Yates v. Aiken, __U.S.__, 108 S.Ct. 534 (1988) and McNally v. United States, __U.S.__, 107 S.Ct. 2875 (1987).

For example, in repeatedly

reaffirming the importance of requiring the government to meet every element of proof required to sustain a conviction, the Supreme Court as recent as January of last year held in Aiken, supra:

> "Sandstrom v. Montana made clear that the Due Process Clause of the Fourteenth Amendment prohibits the state from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in Winship...Today we reaffirm the rule of Sandstrom and the wellspring due process principle from which it was drawn."

Aiken, 108 S.Ct. at 538.

> "Our opinion in Francis explained why a challenge of this kind is supported by the Federal Constitution. The Due Process Clause of the Fourteenth Amendment `protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'...This `bedrock, axiomatic and elementary [constitutional] principle,' id., at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.[citations ommitted] The prohibition protects the fundamental value

> determination of our society,' given voice in Justice Harlan's concurrence in In re Winship, that `it is far worse to convict an innocent man than to let a guilty man go free.' 397 U.S., at 372. See Speiser v. Randall, 357 U.S. 513, 525-526 (1958).' 471 US., at 313.

Aiken, supra at 526. (Emphasis supplied).

Short of strict adherence to the above assurances of proof, we are soon faced with the abhorrent consequence, as here, of sending potentially "innocent" citizens to jail without requiring the government to sufficiently establish their guilt.

The direct departure from well established constitutional and Federal procedural precepts and policies assuring that required elements of proof will be strictly respected before taking away one's freedom, demands no less attention and no less bold pronunciations in this case to "protect the most fundamental of values of our criminal justice system."

At a minimum, therefore, fundamental fairness requires that Petitioner Ryan's conviction be reversed since his conviction was obtained and affirmed based on less proof than required to sustain his guilt.

In relying on the Francis v. Franklin, Sandstrom, In re Winship line of Supreme Court cases for support that "the prosecution must prove every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt", Rose v.Clark, __U.S.__, 106 S.Ct. 3101 (1986), Petitioner respectfully submits this is clearly not the type of situation discussed in Rose, supra, where "Chapman's harmless-error standard applies" Id at 3108-3109.

Indeed, as discussed in Rose, 106 S.Ct. at 3108, for example, the Court cannot conclude that "the jury had found,

in In re Winship's words, `every fact necessary' to establish every element of the offense beyond a reasonable doubt." (Emphasis supplied) The court cannot say "beyond a reasonable doubt" that "the jury has found" "every fact" for "every element" because as previously discussed, the jury could have relied on non overt "facts" or acts for the overt act element of the conspiracy charge. Moreover, because a Pinkerton charge was given, the jury did not have to rely on any "facts" for proving any of the "elements" of the substantive offenses upon erroneously finding Petitioner guilty of conspiring based on the non overt "facts".

Petitioner respectfully submits, therefore, consistent with Rose, that this Court cannot conclude beyond a reasonable doubt that the constitutional error was harmless and that the case should not be reversed. Rose, 106 S.Ct. at 3109.

Though, as stated in Rose, 106 S.Ct. at 3109, "we `do so sparingly'", the circumstances of this case, further exacarbated by the Pinkerton charge, give rise to a case where this Court can and should exercise its "plain authority" to rule that the error is not a harmless error. Id.

At a minimum, as recognized in Rose, supra at 3109, since "the Court of Appeals has not yet applied Chapman to the facts of this case [this Court should] therefore remand to that Court for determination of whether the error committed in this case was harmless beyond a reasonable doubt."

3. THE DECISION BELOW CONFLICTS WITH RECENT SUPREME COURT DECISIONS INTERPRETING THE PROOF NECESSARY TO SUPPORT A WIRE FRAUD CONVICTION.

The prior issues of whether the government was required to prove each element of the charges plainly supports justification for granting the Petition

for a Writ of Certiorari and reversing the lower court decision.

However, there is another issue also concerning the strict requirement that the government prove the correct elements of the criminal charges beyond a reasonable doubt that is a good example of other substantial issues being raised in this appeal. Indeed, it is a good example of the severe prejudice and violation of due process to Petitioner Ryan caused by the government's being allowed to present a case to the jury on less standards of proof than required to support a criminal conviction.

On the wire fraud charges the district court instructed the jury that:

> To act with intent to defraud means to act knowingly with specific intent to deceive someone, ordinarily for the purpose of causing some financial loss or bringing about some financial gain to oneself. (emphasis supplied).

Considering the severe prejudice to

Appellant Ryan, it is time that it come out on the table that the government itself has even recognized that after United States v. McNally, 107 S. Ct. 2875 (1987), a scheme or intent to defraud for the purposes of bringing about financial gain no longer is considered to violate the mail and wire fraud statutes.

The above jury instruction allowed the jury to find proof of intent to commit wire fraud by the government if it found the defendant brought about some "financial gain" to himself.

Yet, after McNally, the Justice Department informed its United States Attorneys that mail or wire fraud may no longer be proved by alleged schemes for financial gain. In a "Memorandum to All United States Attorneys", dated July 29, 1987, and later released to the private bar, entitled "Impact of the McNally Decision", Assistant Attorney General

William F. Weld recognized that McNally "held that a scheme which would result in a gain of money or property to the defendants does not violate the statute. Instead, the Court required that a loss of the victim's property rights must be plead and proved." See also, "U.S. Prosecutors Reel in Wake of Mail Fraud Ruling," The National Law Journal July 20, 1987; "The Convictions That Weren't, The McNally Bombshell." Volume 2, Number 4, Criminal Justice, American Bar Association, (Winter 1988).

Inclusion of the "financial gain" language in the jury instruction was prejudicial to Petitioner Ryan as it allowed the jury to conclude Petitioner's alleged "intent to defraud", through a determination that he "gained" money in the banking wire transactions, when McNally requires specific intent to deprive the institution of money or

property.14/

The possibility that the jury concluded that the "intent to gain" was sufficient to constitute "intent to defraud" is sufficient to require reversal of the wire fraud counts.

Indeed the Fifth Circuit recently rejected an attempt by the government to mitigate its error in providing incorrect instructions after McNally. In United States v. Huls, 841 F.2d 109 (5th Cir. 1988), the defendant was accused of defrauding the State of Louisiana under a right to honest government theory by depriving the State of "...material information," as well as other faithful services. Though this charge was

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14/ To compound the error, while the court's instruction asserted that the statute has a specific intent element, no separate, specific intent instructions were given to assure that the jury understood that "intent to defraud", for wire fraud purposes, is not proven by a defendant's "financial gain."

conceded as erroneous after McNally, the government also argued that the accused deprived the State of a property right, the right to management of its mineral wealth. The Court rejected this argument and held:

> We express no opinion on this assertion, for it is beside the point at issue before this Court. Even if the jury could have convicted Huls and Miller on the same evidence under a correct view of the elements of the offense, the conviction cannot stand if there is a real possibility that the jury convicted on an incorrect view. As the McNally court held:
>
> Although the Government now relies on the assertion that the petitioners obtained property by means of false representations to Wombwell, ...there was nothing in the jury charge that required such a finding. We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction of conduct not within the reach of section 1341. 107 S.Ct. at 2882. ("required" and "permitted" emphasis supplied by the court).
>
> . . .Because the indictment and jury instructions in the instant case permitted the jury to convict on this now invalid theory, we reverse.

Huls, 841 F.2d at 110, 112.

The wire fraud instruction in this case thus indisputably allowed ". . . a real possibility that the jury convicted on an incorrect view." Id.

To allow the wire fraud conviction to stand clearly violates Appellant Ryan's due process rights to require a conviction on the proper elements of proof beyond a reasonable doubt, as previously discussed.

As likewise inconsistent with the Panel Decision in Huls, it is not "clear" in this case "that the jury could convict only upon finding that the scheme to defraud involved a deprivation of property." (Panel decision herein at 30.) Indeed, the Panel Decision itself notes that the mens rea specific intent to defraud definition which is the paramount standard of proof that must be met for the government to establish proof of

"intent" to commit wire fraud, included a definition of "intent to defraud" "for the purpose" of "bringing about some financial gain to oneself". Id. at note 16.

Clearly, therefore, a substantial issue is raised as to whether the jury could have erroneously concluded the government established proof of wire fraud through an element of intent to commit wire fraud that is no longer considered by the Supreme Court or the government itself to violate the law.

Appellant Ryan's well recognized due process rights to have the government prove beyond a reasonable doubt the essential elements of the alleged charges, plainly justifies a grant of the Petition for a Writ of Certiorari and reversal.

Indeed, although the lower court decision failed to address this Court's decision in Stromberg, supra, the

erroneous prejudicial jury instruction on the wire fraud charge likewise requires reversal of the general conspiracy verdict.

Counsel would also note yet another wire fraud issue. It is widely recognized that proof that the wires or mails were used "in furtherance of the alleged fraudulent scheme" is essential, and that the role that the wires or mails play will vary from case to case. Vol. 2, Bricker, Corporate Criminal Liability, Section 8:33 at 28 (Callaghan, 1984).

Consistent therewith, the instant case also involves a close question as to whether the use of the wires herein was "merely incidental and collateral to the [alleged] scheme and not a part of it." Kann v. United States, 323, U.S. 88, 94 (1944). Petitioner had already personally received a check at the land closing from the title company herein which was

later returned insufficient funds. It seems therefore, that the bank's subsequent wiring of the funds without Petitioner's knowledge to correct the error of the title company would be "merely incidental and collateral to the [alleged scheme] and not a part of it," Id. While, as opposed to Kann, it might be argued that "the persons intended to receive the money had [not] received it irrevocably," id., Petitioner had personally received the check at the closing, and "[i]t was immaterial to [him]" "how the bank" on which the check was drawn or the title company would honor the check. "It cannot be said that the [wiring] in question [was] for the purpose of executing the [alleged] scheme, as the statute requires." Kann, supra at 94.

Petitioner would submit therefore that he did "irrevocably receive the proceeds" upon receipt of the hand

delivered check, as the title company as well as the bank obviously intended to honor the check. Kann, 323 U.S. at 94.

CONCLUSION

For all the reasons stated herein, Petitioner Ryan humbly submits that a Writ of Certiorari should issue to review the opinion of the Fifth Circuit.

As recognized by the Supreme Court itself, the type of issues raised herein are the kind of fundamental, bedrock issues of our criminal justice system that assure justice.

Absent respect for such issues by the courts we are faced with the prospect that an innocent man is being deprived of his freedom, when the Supreme Court has recognized that strictly requiring the government to meet "its burden of persuasion beyond a reasonable doubt of every essential element of a crime. . .

protects the fundamental value determination of our society that `it is far worse to convict an innocent man than to let a guilty man go free'." Yates v. Aiken, supra.

"The purpose of that rule is to ensure that only the guilty are criminally punished." Rose, supra at 3107. [quoting the above value determination as well] (Emphasis supplied).

Surely, adherence to such noble American values respecting human freedom warrants exercise of this Court's authority to grant a Writ of Certiorari, to summarily reverse, or at a minimum, to remand to the Court of Appeals "for determination of whether the error committed in this case was harmless beyond a reasonable doubt" "under the Chapman standard." Rose, supra at 3109.

Respectfully submitted,

Hiram C. Eastland, Jr.

HIRAM C. EASTLAND, JR.
(Counsel of Record)
6360 I-55 North
Jackson, Mississippi 39211
Madison Building
1155 15th Street, N.W.
Suite 510
Washington, D.C. 20005

CERTIFICATE OF SERVICE

I, Hiram C. Eastland, one of the attorneys for Petitioner herein, am a member of the bar of the Supreme Court of the United States, hereby certify that on the 7th day of January, 1988, I served copies of Petitioner's foregoing Petition for a Writ of Certiorari on the party hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage pre-paid, to each of the following persons:

Honorable Charles Freed,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

No. 88-1126

Supreme Court, U.S.
FILED
JAN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROY L. RYAN
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-1683

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY RYAN, TYRELL BARKER,
a/k/a TERRY BARKER, and
LAURENCE B. VINEYARD, JR.,

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Texas
(CR-86-00041-04)

(October 12, 1988)

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

REAVLEY, Circuit Judge:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

Pursuant to that Rule, the court has determined that this opinion should not be published.

Ryan, Barker, and Vineyard appeal from criminal convictions of conspiracy, making false statements, wire fraud, and misapplication of bank funds. We affirm.

I. Facts

On December 10, 1986, and 18-count superseding indictment was returned in the United States District Court for the Northern District of Texas charging Ryan, Barker, Vineyard and others with conspiring to misapply bank funds, to conceal material facts within the jurisdiction of the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Deposit Insurance Corporation ("FDIC"),to make false statements in a loan application, to make false entries in bank records, and to commit mail and wire fraud, in violation of 18 U.S.C

371 1/ (count 1). Appellants were charged substantively with three counts of making false statements in connection with a loan application, in violation of 18 U.S.C. 1041 2/ and 2 3/

1/ 371 provides as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2/ 1014 provides as follows:

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Re-construction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmer's Home Corporation, the Secretary of Agriculture acting through the Farmer's Home Administration, any Federal intermediate credit bank, or any division,

officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owner's Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more that $5,000 or imprisoned not more than two years, or both.

3/ 2 provides as follows:

(a) Whoever commits an offense against the United States or aids, abets,

(counts 4-6), and with twelve counts of mail and wire fraud, in violation of 18 U.S.C. 1341,4/ 1343,5/

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counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4/ 1341 provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than

and 2(Counts 7-18). Barker and Vineyard were also charged with two counts of misapplying bank funds, in violation of 18 U.S.C. 657[6]/ and 2 (Counts 2-3).

$1,000 or imprisoned not more than five years, or both.

[5]/ 1343 provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[6]/ 657 provides as follows:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owner's Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmer's Home Administration, or any land bank, inter-

Following a jury trial, all three appellants were convicted on three counts of making false statements in connection with a loan application (Counts 4-6) and on two counts of wire fraud (Counts 7 and 13); Barker was convicted on two counts of misapplying bank funds (Counts 2 and 3) and on one count of making false

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mediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration or any small business investment company, and whoever, being a receiver of such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise instructed to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $1000, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

statements in connection with a loan application (Counts 5 and 6).7/

The evidence presented to the jury during this three week trial was complex -- as might be expected. Sammy Spikes, a prominent west Texas businessman, provided the government's key testimony.

7/ Appellants were sentenced as follows:

Ryan was sentenced to five years' imprisonment on Count 1, two years on Counts 4-6, and three years on Counts 7 and 13, with the sentences on Counts 4-7 and 13 to run concurrently with each other but consecutively to the sentence on Count 1. Ryan was fined $5,000 on Counts 1 and 4 through 6 and $1,000 on Counts 7 and 13 for a total of $22,000.

Barker received a sentence of five years' imprisonment on Count 1 and two years' imprisonment on Counts 2, 3, and 5, with all sentences to be concurrent. Barker was fined $5,000 on each count for a total of $20,000.

Vineyard was sentenced to five years' imprisonment on Count 1 and two years' imprisonment on Counts 2, 3, 5, and 6, with all sentences to run concurrently. In addition, Vineyard was fined $5,000 on each count for a total of $25,000.

The court also ordered Ryan and Vineyard to pay restitution for any financial losses they caused.

Spikes testified that in August of 1983, bank examiners were questioning his sizeable business and personal loans that were outstanding at the Moncor banks in New Mexico. In addition to the Moncor loans, Spikes owed substantial sums of money to appellant Ryan. At the same time, appellants Barker and Vineyard were interested in purchasing Key Savings and Loan Association in Colorado ("Key") but were having trouble finding financing. Appellants and Spikes devised a scheme whereby Barker and Vineyard could purchase Key Savings and Loan and Spikes could repay his debts.

Under this scheme, Moncor officials agreed to lend Barker and Vineyard enough money to buy Key with the understanding that Key would lend Spikes the money both to repay his debts to Moncor and to purchase a tract of ranch land in New Mexico that Ryan had found (and secretly

owned). According to Ryan, this ranch land had an appraised value far exceeding its asking price; therefor, the purchase price upon which any loan was based could be inflated artificially through a series of "land flips." Spikes could use the difference between the real purchase price and the loaned purchase price to repay his debts.

While Moncor was considering their request for financing and as a show of good faith, Barker and Vineyard agreed to transfer immediately one of the loans that concerned Moncor officials to Brownfield Savings and Loan ("Brownfield"), which Barker owned. Shortly thereafter Moncor provided the financing with which Barker and Vineyard purchased Key. Then, in a transaction involving an inflated appraisal, fictitious financial statements, shell corporations, and straw men "borrowers" who concealed Spikes' in-

volvement, Key loaned $4,500,000 to Spikes to finance the New Mexico ranch land. Key actually disbursed $3,800,000 of that amount to Spikes even though Spikes had purchased the property for only $1,590,000. Spikes used the difference to repay his outstanding debts both to Moncor and to Ryan. The loan eventually went into default.

II. Sufficiency of the Evidence

Appellants contend in varying degrees that the evidence was insufficient to support their convictions.8/ Our review of the sufficiency of evidence is limited. We view both the

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8/ The government asserts that Ryan did not raise sufficiency of the evidence points regarding his wire fraud convictions on Counts 7 and 13. Ryan counters in his reply brief that in fact he does challenge the sufficiency of the evidence supporting those convictions. Whether or not Ryan properly raised the points, we find that the evidence was sufficient to support the convictions based on the same reasoning given herein.

evidence and all inferences reasonably drawn therefrom in the light most favorable to the government and sustain a conviction whenever a reasonable juror could have concluded that the evidence established guilt beyond a reasonable doubt. United states v. Hernandez-Palacios, 838 F.2d 1346, 1348 (5th Cir 1988); United States v. Bell, 678 F.2d 547, 549 (5th Cir Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). It is not our province to reweigh the credibility of a witness. United States v. Gardea Carrasco, 830 F.2d 41, 43-44 (5th Cir. 1987). Applying this standard, we conclude that the evidence was sufficient to support the appellants convictions.

A. Conspiracy Convictions

Ryan alleges that the evidence was insufficient to prove that (1) he joined

the conspiracy described in Count 1, and (2) he conspired to make false statements to Brownfield Savings and Loan. Vineyard and Barker, too, argue that the evidence was insufficient to support their conspiracy convictions.

"To sustain a conspiracy conviction, the government must establish that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it." United Stated v. Osgood, 794 F.2d 1087, 1094 (5th Cir.), cert. denied, 107 S.Ct. 596 (1986). See also United States v. Richardson, 833 F.2d 1147, 1152 (5th Cir. 1987). A jury may infer that a defendant knew of the conspiracy and participated in it from "a `development and collection of circumstances.'" United States v. Marx, 635 F.2d 436, 439 (5th Cir. Unit B 1981) (quoting Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed.

680 (1942)). The government need not prove that the defendant knew of all the details, but instead must show only that he knew of the conspiracy's essential purpose. Osgood, 794 F.2d at 1094; United States v. Davis, 666 F.2d 195, 201 (5th Cir, Unit B. 1982).

The record demonstrates that there was sufficient evidence to show both the existence of the conspiracy and the knowing participation of each appellant in it. From the beginning it was understood that as an inducement to Moncor for financing Barker's and vineyard's acquisition of Key Savings and Loan, appellants would undertake to generate unlawful proceeds to retire Spikes' outstanding loans at Moncor's banks. All three appellants knew that the plan would involve a third party borrower since Spikes could not borrow additional funds himself. Similarly, all three knew that a

"blown-up appraisal" would be used and that the planned "land flip" would eventually leave some "fool" financially "buried."

As a demonstration of good faith, Barker and Vineyard agreed to an immediate transfer of one of Spikes' loans from Moncor to Brownfield savings and Loan. To facilitate that transaction Barker approved two unsecured loans for fictitious purposes a week before the "borrowers" even make application and Vineyard ordered the disbursement of those funds. Additionally, Ryan relayed instructions from Barker and Vineyard to Spikes to set up two shell corporations to handle the "land flip." Ryan then purchased the land to be used in the "flip," had the land appraised at a drastically inflated value, and assisted in the preparation of various fictitious financial statements. Later vineyard

personally presented the Geleta loan package to Key's loan committee without fully disclosing the true nature of the transaction.

Appellants contend that their conspiracy convictions should be reversed because there was no evidence that they knew of or participated in certain transactions which transpired. The evidence amply demonstrates that appellants knew of the conspiracy's essential purpose; therefore, they need not have been aware of or participated in each and every aspect of the conspiracy.

Further, Ryan;s claim that he should have been acquitted since, as alleged in the indictment, he did not agree to the submission of false financial statements at both Key and Brownfield Savings and Loan Associations is without merit. The Supreme Court had determined that "when a jury returns a guilty verdict on an

indictment charging several acts in the conjunctive,. . . the verdict stands if the evidence is sufficient with respect to any one of the acts charges." Turner v. United States, 396 U.S. 398, 420 90 S. Ct. 642, 654, 24 L.Ed.2d 610 (1970). On this basis this court has previously held that when a conspiracy to commit multiple substantive offenses is alleged, a general guilty verdict may properly be sustained if there is sufficient evidence to support any one of the multiple objectives. See United States v. Livingston, 816 F.2d 184, 195 (5th Cir. 1987); United States v. Bruno, 809 F.2d 1097, 1103-04 (5th Cir.), cert. denied, 107 S.Ct. 2198, 95 L.Ed.2d 853 (1987).9/

9/ Ryan further argues that the conspiracy conviction should be overturned because the court instructed (favorably to Ryan) the jurors that if they found that the conspiracy charged did not exist, they must return a not guilty verdict even though they found "that some of the conspiracy existed." This quoted phrase, a typographical error, did appear in the transcribed jury instructions.

B. Misapplication convictions

Both Barker and Vineyard assert that the evidence was insufficient to support their misapplication convictions on Counts 2 and 3. Relying primarily on United States v. Gens, 493 F.2d 216 (1st Cir. 1974) they contend that there was no misapplication of Brownfield's funds since Brooks and Harrison, the nominee borrowers, were financially capable and understood their responsibilities to repay the loans.

To establish a violation of 18 U.S.C. 657, the government must prove,

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However, the instructions from which the court read properly informed the jury that it should acquit Ryan if it found he participated in "some other conspiracy." In addition, the transcribed instructions included the correct phrase in the sentence immediately following that quoted by Ryan. Furthermore, the court had already properly instructed the jury that the government need only prove a single object of the conspiracy in order to convict. We conclude that the court's instructions did not require the jury to acquit Ryan on the conspiracy count if it found he did not personally participate in the Brownfield transaction.

among other things, that the accused willfully misapplied funds belonging to a financial institution and that he acted with the intent to injure or defraud that institution. See United States v. Farrell, 609 F.2d 816, 818 (5th Cir. 1980). This court has adopted the rule that "the requisite intent is proven by showing a knowing, voluntary act by the defendant, the natural tendency of which may have been to injure the bank even though such may not have been his motive." United States v. Southers, 583 F.2d 1302, 1305 (5th Cir. 1978). A criminal misapplication of funds may be inferred where loans have been made "with a conscious disregard of a substantial and unjustifiable risk of injuring" the lending institution. United State v. Fusaro, 708 F.2d 17, 21 (1st Cir.), cert. denied, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983). In other words, "[t]he trier of fact may infer the re-

quired intent, i.e., knowledge, from the defendant's reckless disregard for the interest of the bank." United States v. Adamson, 700 F.2d 953, 965 (5th Cir. Unit B) (en banc), cert denied, 464 U.S. 833, 104 S.Ct. 116, 78 L.Ed.2d 116 (1983).

In Gens, the First Circuit determined that willful misapplication counts fall into three general categories: (1) Those in which bank officials knew the named creditor was either fictitious or wholly unaware that his name was being used; (2) cases in which bank officials knew the named debtor was financially incapable of repaying the loan whose proceeds he passed on to the third party; and (3) cases in which bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds: in other words where the debtor allowed only his name to be used,

enabling the bank officials to grant a de facto loan to a third party to whom the bank was unwilling to grant a formal loan. Gens, 493 F.2d at 221, 222.

Barker and Vineyard attempt to distinguish their situation from those listed above and claim that here, as in Gens, no criminal activity should have been found to exist. They assert that in a situation where the named debtor is financially capable and fully understands his responsibility to repay the money, a loan to him cannot constitute willful misapplication of funds even if the bank officials know he will turn the proceeds over to a third party.

We believe that Gens is inapplicable to the case before us.10/ In so holding

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10/ We recognize that there is a split in the circuits on the question of whether a bank officer is guilty of a criminal misapplication when he loans funds to a financially capable and responsible nominee borrower with knowledge that the

we note that even the Gens court cautioned that "we do not go so far as to say that the obligation of a financially responsible party to a bank will in all cases mean post-loan transfer to a third party will not result in liability for willful misapplication" and that there may be "special circumstances demonstrating injury or risk of injury to the bank despite the obligation of a financially responsible party to the bank." Gens, 493 F.2d at 222 n.14. In addition, the Fifth Circuit has recognized since Gens that a scheme in which a straw man borrower obtains bank funds for someone who

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funds ultimately will be channeled to a third party. We find it unnecessary to take sides in this conflict on the facts before us. See United States v. Salinas, 654 F.2d 319, 329 n.10 (5th Cir. Unit A 1981), rev'd on other grounds, United States v. Adamson, 700 F.2d 953 (5th Cir. Unit B.) (en banc), cert. denied, 464 U.S. 833, 104 S.Ct. 116, 78 L.Ed.2d 116 (1983).

cannot himself obtain a formal loan comes within the scope of misapplication of bank funds. United States v. Cyr, 712 F.2d 729, 734 (1st Cir. 1983).

Based on the record before us, we think it is clear that there was no bona fide loan to the straw men, Harrison and Brook, at all. Each of the parties involved knew that Brooks and Harrison were names only and no one, including the lending officials and the "borrowers" themselves, actually expected them to repay the loaned amount.

As evidence of this the government showed that the nominee borrowers were neither willing nor able to repay the loans. Spikes assured both Harrison and Brooks that he would refinance the loans or have the bank's board of directors formally assume the loans in order to relieve them of personal liability. Additionally, Harrison refused to sign

the loan application since he did not consider himself personally responsible for the loan. Even at the time the loans were made, Harrison, doubted his capacity to repay the loan without difficulty and Brooks admitted that he was "having a hard time financially" due to the millions of dollars he already owed.

More important than this evidence, however, are the two special circumstances which establish criminal misapplication in this case. First, the loans were approved under circumstances that created a "substantial and unjustifiable risk" to the savings and loan. Fusaro, 708 F.2d at 21. In August of 1983 both the Moncor banks and Spikes' banks were being audited. Appellants were aware at that time that federal regulators had prohibited their institutions from making further loans to Spikes and that Moncor officials were desperate to transfer a nominee loan

set up by Spikes to another lender. Despite their knowledge, appellants approved loans to the nominee borrowers Spikes suggested before those borrowers were even asked to apply for the loans, see Cyr, 712 F.2d at 733, and before they made any investigation into the borrower's abilities to repay.11/ Moreover, the loan commitment sheets falsely identified the loans' purposes as "working capital" and, despite their size, the loans were unsecured. See United States v. Payne, 750 F.2d 844, 857 (11th Cir. 1985). These factors provide ample evidence from which a jury could have inferred intentional misconduct.

A second special circumstance is the fact that Barker and Vineyard furthered

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11/ Although Vineyard claims he asked Reed about the borrowers' abilities to repay the loans, his inquiry came after he directed Reed to issue the loans and long after Barker approved them.

their own personal interests in authorizing the loans to Harrison and Brooks. We find that this is at least some evidence of fraud when a straw man borrower is used. See United States v. Austin, 823 F.2d 257, 259 (8th Cir. 1987), cert. denied, 108 S. Ct. 778, 98 L.Ed.2d 864 (1988); United States v. Clark, 765 F.2d 297, 305 (2d Cir, 1985).

The circumstances here strongly suggest that Barker and Vineyard would not have approved the nominee loans to Harrison and Brooks but for their negotiations with Moncor to obtain financing to purchase Key. Newman, a Moncor official, testified at trial that there was no formal squid pro quo, but that Moncor would not have loaned money to Barker and Vineyard if there had been "no chance" of their helping Spikes repay his loans to Moncor. After Barker and Vineyard agreed to transfer the nominee loan immediately,

without waiting on the "land flip" proceeds, Moncor officials only shortly thereafter approved their financing request. From this set of facts a reasonable jury could infer that the nominee loans to Harrison and Brooks were a show of good faith to Moncor officials that Barker and Vineyard would return the favor if their financing request were approved. The evidence supports Barker's and Vineyard's misapplication convictions.

C. False statement convictions

(1) Ryan

Ryan further alleges that the evidence was insufficient to prove his involvement in the creation of false financial statements for Brooks and McCallister, which supported the Key loan for purchase of the Geleta Ranch. Although Ryan does not dispute that the statements that were submitted to Key

were overvalued, he contends that the government failed to prove that Ryan was aware of that fact. To the contrary, and as Ryan readily admits, Ryan told Spikes that Key wanted a higher net worth on the Geleta borrowers' financial statements before it would make the loan. To accomplish this, Ryan suggested that the assets on the financial statements needed to be "bumped up." Ryan later admitted to the FBI that even at the time this was going on he believed Brooks and McCallister were in poor financial condition. The evidence fully supports Ryan's conviction.

(2) Vineyard

Vineyard contends that the evidence was insufficient to support his convictions for aiding and abetting the submission of false statements to Key (Counts 5 and 6) and for violating 18 U.S.C. 1014 (Count 5). He complains that the infor-

mation in the Geleta financial statement (Count 5) was not false, that he lacked knowledge of the falsity of Brook's financial statement (Count 6), and that he was unaware of any criminal conduct at the time he presented the financial statements to Key's loan committee.

The evidence sufficiently demonstrated Vineyard's participation in the charged conspiracy. Under Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 90 L.Ed. 1489 (1946), the jury could find on that basis that Vineyard was liable for the substantive offenses he co-conspirators committed in furtherance of that conspiracy. The evidence supports Vineyard's convictions on Counts 5 and 6.

Regarding the false financial statement charge set out in Count 5, Vineyard, as well as all other participants, knew that Geleta Ranch, Inc. was a shell

corporation without any assets set up at his and Barker's direction to accommodate the "land flip" scheme. The financial statement listing Geleta's assets in excess of $7,000,000 was therefor patently inaccurate. Further, whether or not the financial institution relied on the statement in making its loan decision is insignificant. "[T]he essence of a 1014 offense is the making of the false statement with the intent to influence the lender, and it is not dependent upon the accomplishment of that purpose. . . . It is a crime . . . requiring neither reliance by the bank officers nor an actual defrauding." United States v. Shaid, 730 F.2d 225, 232 (5th Cir.) (citations omitted), cert. denied, 469 U.S. 844, 105 S.Ct. 151, 83 L.Ed.2d 89 (1984).

Furthermore, the evidence was sufficient to support Vineyard's conviction on

Count 6. Vineyard argues that he was neither aware of Brook's financial condition nor present when Brook's financial statement was being altered and that on this basis his conviction on Count 6 should be reversed. However, as the record shows and as Vineyard admits, he did personally direct the issuance of the $165,000 nominee loan to Brooks. Despite his awareness of that substantial liability, Vineyard failed to notify Key's loan committee that the nominee loan was omitted from Brook's financial statement. This evidence, coupled with other evidence of Vineyard's involvement in the scheme to defraud the two savings and loans, fully supports the jury's finding of Vineyard's criminal intent to aid and abet the submission of a false financial statement.

(3) Barker

While Barker does not directly

challenge the sufficiency of the evidence supporting his false financial statement conviction (count 5), he does maintain that that conviction should be reversed due to the jury's inconsistent verdicts of acquittal on the interrelated false financial statement offense charged in Count 4 and the scheme to defraud by use of the mails alleged in Count 7.12/

As a general rule, inconsistent verdicts do not afford a basis for attacking the validity of a conviction. United States v. Powell, 469 U.S. 57, 105

12/ Count 4 charged Barker, co-owner of Key, with aiding and abetting Bobby McCallister in the creation of a false personal financial statement in connection with the $4.7 million loan from Key. Count 5 alleged that Barker assisted in the making of a false commercial financial statement of Galeta Ranch in connection with the same loan. Count 7 charged Barker with aiding and abetting the wire fraud perpetrated in connection with the general scheme, part of which included the making of those same two financial statements.

S.Ct. 471, 83 L.Ed. 2d 461 (1984); United States v. Gordon, 780 F.2d 1165, 1176 (5th Cir. 1986). Such inconsistencies are commonly the result of "mistake, compromise, or lenity." Powell, 469 U.S. at 65. Barker urges us, however, to follow other circuits that have carved out exceptions to the general rule in cases where the offenses are particularly interrelated. He cites as examples United States v. Hannah, 584 F.2d 27 (3rd Cir. 1978) and United States v. Brooks, 703 F.2d 1273 (11th Cir. 1983).13/

This court has never deviated from the general rule as it is articulated in Powell, 469 U.S. at 67. The evidence here was sufficient to link Barker to the charged conspiracy. Therefore, under the

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13/ Both of these cases were decided before Powell, in which the Court criticized cases such as these that attempt to circumvent the inconsistent verdict rule. Powell, 469 U.S. at 61-62, 63-64.

court's instructions, the jury was free to find Barker guilty of the false financial statement offense charged in Count 5 which his co-conspirators committed in furtherance of the conspiracy. See Pinkerton, 328 U.S. at 645-48; United States v. Michel, 588 F.2d 986, 999 (5th Cir.), cert. denied, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979).

III. Variance between indictment and proof

Ryan argues that his convictions should be reversed because there was a fatal variance between the indictment and the proof of trial. See Salinas, 654 F.2d at 324-25. Specifically, the indictment charged that Ryan joined a conspiracy that commenced on June 1, 1983, and that he committed successive overt acts to further the conspiracy. At trial the prosecutor stated that the conspiracy started "around the 25th of

August, 1983." Such a variance is not fatal in this case.

The proof at trial is not expected to duplicate the charges contained in an indictment. See United States v. Heimann, 705 F.2d 662, 666 (2d Cir. 1983). A variance between charges and proof is prejudicial only if it "effectively alter[s] the charged terms of the indictment." United States v. Cusmano, 659 F.2d 714, 719 (6th Cir. 1981), cert. denied, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984). If the variance does not change the government's basic theory of the case, unfairly surprise the defendant, or create a risk that the defendant might be prosecuted twice for the same offense, a defendant's substantial rights are not affected. See United States v. Miller, 471 U.S. 130, 134-35, 105 S.Ct. 1811, 1814, 85 L.Ed.2d 99 (1985); United States v. Massey, 827 F.2d 995, 1003-04 (5th

Cir. 1987).

Here, Ryan does not contend that the indictment failed to charge the offense for which he was convicted; instead, he complains that the indictment charged more than was necessary. As the Court made clear in Miller, this does not warrant invalidating the conviction. Miller, 471 U.S. at 140. Rather, the appropriate remedy is to ignore that part of the indictment that is unnecessary in proving the offense. Id. at 136.

In a conspiracy prosecution, the government need not prove the exact point in time at which the conspiracy began. See United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). No matter when this conspiracy actually began, the evidence shows that the government proved the same conspiracy that was alleged in the indictment and

that Ryan voluntarily participated in that conspiracy.

Ryan further asserts that he was prejudiced by the court's failure to redact certain overt acts from the indictment before it was submitted to the jury.14/ In particular, Ryan points to

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14/ Appellants admit that throughout the trial the district court conscientiously attempted to determine the point in time at which the conspiracy actually began. Prior to the trial the following conversation took place regarding striking certain overt acts from the indictment:

The Court: Do I need to strike it right now?

Mr. Gibson: I am not saying that you need to strike it right now. I just want it on record so when we get to instruction time and the presentation of the indictment, we won't get in a bind.

The Court: We will probably at that time delete it from the indictment. I am intending to give a copy of this indictment to the jury, along with the instructions, because I don't see how they are going to understand this thing, anyway, without something to guide them, and we can take it out at that time. But be sure and call my attention to it.

At the time the charge and the court's instructions to the jury were being prepared, appellants neither reminded the court of this conversation

eleven overt acts that should have been redacted to conform to the government's proof that the conspiracy began in the latter part of August. The government concedes that those acts should have been stricken, yet disagrees on the issue of prejudice to Ryan. We find that Ryan was not prejudiced by their inclusion in the indictment.

Ryan, relying on Fed. R. Evid. 404(b), argues that he was prejudiced by the introduction of evidence regarding the extraneous overt acts. Although he acknowledges that the prosecutor advised the court that the evidence of these acts was relevant to show the background and relationship between Spikes and the

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that had occurred some three weeks before nor objected to the inclusion of the overt acts in the indictment. While we have serious reservations regarding whether Ryan has preserved this issue for appeal, we will address briefly the merits of his argument.

appellants, Ryan claims that the prosecutor later "shifted the grounds for admission and offered the evidence to show `motive, intent' and knowledge." Ryan bases this claim on one brief bench conference that took place during the trial:

> The Court: What is your purpose in introducing this?
>
> Mr. McRoberts: To show where the money went,to show the relationship between these individuals, that Mr. Ryan was -- to show intent, motive, that he had acted as, and knew --
>
> The Court: When was this done?
>
> Mr. McRoberts: June of 1983.

Ryan asserts that because the prosecutor used the words "motive" and "intent," Fed. R. Evid. 404(b) must govern the admissibility question and therefore the court was duty bound to instruct the jury on how to receive the evidence.

We first note that nowhere in the record does it appear that Ryan or any

other appellant requested such an instruction. Second, even if the pre-August 25 loans were not illegal and did not constitute prior bad acts, they were relevant to show the background of the charged conspiracy and therefore admissible. The loans showed the lending relationships between the parties and revealed the extent of Spikes' indebtedness that led to the "land flip" scheme. See United States v. Pepe, 747 F.2d 632, 671-72 (11th Cir. 1984); United States v. McDaniel, 574 F.2d 1224, 1227 (5th Cir. 1978), cert. denied, 441 U.S. 952, 99 S.Ct. 2181, 60 L.Ed.2d 1057 (1979).

Third, the record shows that the jury did not rely on these overt acts in finding appellants guilty on the conspiracy count. Ryan was convicted on five substantive offenses, each of which was listed as an alleged overt act and each of which occurred after the com-

mencement of the conspiracy. See United States v. Saenz, 747 F.2d 930, 937 (5th Cir. 1984), cert. denied, 473 U.S. 906, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985). Since acts occurring outside the scope of the proved conspiracy did not form the basis for Ryan's conspiracy conviction, he was not prejudiced by their inclusion in the indictment.

IV. Duplicitous joinder of two offenses

Ryan next alleges that Count 1 of the indictment was fatally duplicitous in that it charged two separate offenses: one conspiracy to defraud Brownfield Savings and Loan and another to defraud Key Savings and Loan. By failing to challenge this alleged duplicity before trial, Ryan failed to preserve the issue for appeal.15/ See United States v.

15/ Ryan asserts in his reply brief that he did object on this ground before trial. The record shows, however, that Barker's attorney is the one who in fact

Lyons, 703 F.2d 815, 821 (5th Cir. 1983); Fed. R. Crim. P. 12(b) (2) and (f). His attempt to avoid this problem by arguing that a misjoinder of defendants is inherently prejudicial is foreclosed by United States v. Lane, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986), in which the Supreme Court rejected the notion that misjoinder is inherently prejudicial. To constitute reversible error, a misjoinder must result in actual prejudice to an accused's substantial rights. Id. 474 U.S. at 449. Ryan has shown no such actual prejudice.

In any event, the face of the indictment alleges that all of the

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raised the issue. Ryan's attorney neither adopted Barker's comments nor made an independent objection. In addition, Ryan's attorney did not specifically request an instruction on a multiple conspiracy theory at any time during the trial. See United States v. Erwin, 793 F.2d 656, 662 d(5th Cir.), cert. denied, 107 S.Ct. 589, 93 L.Ed.2d 590 (1986).

substantive criminal offenses were part of one conspiracy to defraud Key and Brownfield Savings and Loans in order to repay Spike's debts to Moncor. See United States v. Bruun, 809 f.2d 397, 406 (7th Cir. 1987). Nor were multiple conspiracies proven at trial. The evidence established that one common goal existed and that overlapping participants worked to carry out that goal of defrauding the two savings and loan associations. See United States v. Richardson, 833 F.2d 1147, 1153 (5th Cir. 1987).

V. Jury Instructions

Each of the appellants challenges the jury instructions on varying grounds.

A. One conspiracy with multiple objects

Barker contends that the court erroneously instructed the jury in regard to Count 1, which alleged that Barker was part of one conspiracy to violate seven statutes. Barker asserts that a

violation of one of the listed statutes, 18 U.S.C. 657, is merely a misdemeanor and that a lesser sentence is warranted if the jury found Barker guilty of violating that statute alone. Barker admits that as a general rule reversal is not required by a court's failure to instruct the jury to respond to each specific object in a conspiracy, see United States v. Santana, 503 F.2d 710, 715 (2d Cir.), cert. denied, 419 U.S. 1053, 95 S.Ct. 632, 42 L.Ed.2d 649 (1974), yet claims his rights were substantially prejudiced in this case, mandating reversal. As proof of this prejudice, Barker points out that 18 U.S.C. 657 may constitute a misdemeanor offense, in which case, under 18 U.S.C. 371, the punishment for conspiring to commit that offense could not exceed the maximum punishment provided for that

offense. Therefore, Barker continues, if the jury's verdict regarding Count 1 of the indictment reflected a misdemeanor conviction only, then a trial court's sentence may have been impermissible. Barker concludes that this uncertainty and the potentially illegal sentence substantially prejudiced his rights.

Although the government failed to address Barker's argument directly, it did correctly point out in another section of its brief that 18 U.S.C. 657 creates misdemeanor liability only if the misapplication of funds involved less than one hundred dollars. Because the misapplications that were the objects of the charged conspiracy were considerably in excess of that amount, we find Barker's argument to be without merit.

B. Unanimity necessary as to one object offense

The trial court instructed the

jury that the conspiracy included six separate substantive offenses and that the jury could return a guilty verdict upon finding that a defendant conspired as to only one offense, if the jury unanimously agreed on that offense. Vineyard alleges that this instruction, by allowing the return of a general verdict, deprived him of his right to a unanimous verdict. He asserts that his conspiracy conviction must be reversed in any one of the object offenses is found to be legally insufficient since the jury could have based its guilty verdict on an insufficient ground.

This counrt has held that a guilty verdict will be sustained where there is sufficient evidence to support any one of the multiple offenses in a conspiracy count. See United States v. Liningston,

816 F.2d 184, 195 (5th Cir. 1987). Here the evidence was clearly sufficient to meet this test.

C. Refusal to submit a Gens instruction

Vineyard argues that the court erred in refusing to instruct the jury that a person is not liable under 18 U.S.C. 657 for misapplication of funds if he believed the named borrowers to be financially capable of repaying the loan, even though he knew the funds were going to a third party. This requested instruction was based on the Gens rationale discussed under II. We have already determined that this case did not present a Gens situation; therefore, we find that the trial court properly refused to submit the requested instruction.

D. Elements of wire fraud

Ryan protests that the court's instruction regarding wire fraud was erroneous under McNally v. United States,

107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).16/ Specifically, Ryan contends that the instruction permitted a guilty verdict without the showing of a property deprivation required by McNally. McNally, which held that a scheme to defraud citizens of their intangible rights to honest government was not punishable as mail fraud, is not properly invoked in this case. The court's instructions unambiguously referenced the scheme to defraud the savings and loans of money and property and made clear that the jury could convict only upon finding that the scheme to defraud involved a deprivation

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16/ The court instructed the jury as follows:

> To act with intent to defraud means to act knowingly with specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself.

of property.17/ In light of these instructions, we find Ryan's argument to be without merit.

E. Instructions regarding 657 elements

The trial court instructed the jury on the conspiracy count that the elements of the six object offenses would be set forth in that part of the charge which addressed the substantive offenses. In addition, the court pointed out that Ryan was not charged in the 657 misapplication of funds counts. Ryan argues that this was an ambiguous instruction that

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17/ The court instructed that, in order to convict, it must find that Ryan "devised a scheme to defraud or for obtaining money or property," defining a "scheme to defraud" as "any plan or course of action intending to deceive others and to obtain by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived." The court further instructed that the scheme to defraud must be "substantially the same . . . one alleged in the indictment." The indictment described the scheme as one "to obtain money and property from Key Savings and Loan."

confused the jurors by suggesting that they ignore the first instruction given when considering Ryan's guilt on Count 1. By failing to object to this portion of the charge, Ryan failed to preserve the issue for appeal.

VI. Pinkerton conviction

Both Ryan and Vineyard assert that if this court reverses their conspiracy convictions then the convictions on the substantive offense counts must also be reversed. They based this claim on the fact that the jury was instructed under United States v. Pinkerton, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), which provided that a defendant may be convicted for substantive offenses committed by his co-conspirators even if he did not participate in them. Because we have affirmed the conspiracy convictions in this case, we need not address this issue.

VII. Speedy trial claim

Vineyard claims, without supporting argument, that he was denied his right to a speedy trial by the trial court's granting of a co-defendant's motion for continuance over his objection. Vineyard was arraigned on July 10, 1986. On September 10, 1986, the trial court granted the motion for continuance at the request of several co-defendants and due to the complexity of the case an the existing pretrial motions that needed to be resolved. The district court's action was proper. By its express terms the Speedy Trial Act excludes from its time limitations delays that are attributable to the actions of co-defendants (18 U.S.C. 3161(h) (7)), the disposition of pretrial motions (18 U.S.C. 3161(h) (1) (F)), and the designation of a case as "unusual" or "complex" (18 U.S.C. 3161(h)

(8)(B)(ii)). All three factors were present here.

Further, as a general rule, a "time exclusion that applies to one defendant is applicable to all co-defendants." See United States v. Zielie, 734 F.2d 1447, 1454 (11th Cir. 1984), cert. denied, 469 U.S. 1189, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985). Nor has Vineyard established that he was substantially prejudiced by the delay. We find his argument to be without merit.

VIII. Severance claim

Vineyard next protests, without elaboration, the trial court's denial of his motion for severance. Under United States v. Wheeler, 802 F.2d 778, 781-82 (5th Cir. 1986), cert. denied, 107 S.Ct. 1354, 94 L.Ed.2d 524 (1987), Vineyard must demonstrate a "compelling prejudice" in order to establish that the court abused its discretion in denying his

motion for severance. Because he made no such showing, his claim necessarily fails.

IX. Presentence report

Vineyard also alleges that the trial court erred in failing to conduct a hearing to make findings regarding disputed statements in the presentence report. In particular Vineyard asserts that the statement concerning the amount of Key's loss was inaccurate since, as the owner of nearly all of Key's stock, he himself incurred the vast proportion of the loss.

Fed. R. Crim. P. 32(c)(3)(D) provides that when a criminal defendant "allege[s] any factual inaccuracy in the presentence investigation report or the summary of the report . . . the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such

finding is necessary because the matter controverted will not be taken into account in sentencing." Here the trial judge fulfilled his obligation by expressly disregarding the statements in the presentence report concerning both the identity of the victim and the amount of the loss in imposing sentence. He was not otherwise required to make findings regarding alleged inaccuracies. See United States v. Navaro, 774 F.2d 565, 566 (2d Cir. 1985).

X. Propriety of the sentences

Finally, both Ryan and Vineyard assert that their five-year sentences for conspiracy violate due process. They argue that one of the object offenses, making a false statement in a loan application (18 U.S.C. 1014), provides for a maximum sentence not to exceed two

years.18/

The general conspiracy statute, 18 U.S.C. 371, provides that anyone convicted of conspiring to commit a felony offense "shall be . . . imprisoned not more than five years . . . ." Only in situations in which the underlying offense is a misdemeanor is "the punishment for such conspiracy . . . the maximum punishment for such misdemeanor." While Ryan and Vineyard apparently concede that a violation of 1014 is a felony, they argue that the 371 limitation shows the intent of Congress that the punishment for conspiracy not exceed that for the object offense.

It is well settled that "a sentence imposed . . . within statutory limits is

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18/ Vineyard also raises the claim that 18 U.S.C. 657 provides for misdemeanor liability in certain circumstances. We addressed this argument under V., A. and found it to be without merit.

generally not subject to review." United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). In addition, a conspiracy is a separate crime which merits separate punishment; that punishment can be even more severe than the punishment for the completed substantive offense. Iannelli v. United States, 420 U.S. 770, 777-78, 95 S.Ct. 1284, 1289-90, 43 L.Ed.2d 616 (1975). There is no question but that Ryan's and Vineyard's sentences are within the statutory limits imposed by 18 U.S.C. 371. We therefore find their arguments to be meritless.

The judgement of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-1683

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

ROY RYAN,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(November 9, 1988)

Before REAVLEY, JOHNSON, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

THOMAS M. REAVLEY
United States Circuit Judge